IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SAMUEL GEORGE ALVARADO, Petitioner/Appellee, v. SARA JUDITH ALVARADO, Respondent/Appellant.	2 CA-CV 2005-0093 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20030019

Honorable Kyle A. Bryson, Judge Pro Tempore

AFFIRMED

Patricia Ann Taylor — Tucson
Attorney for Petitioner/Appellee

Kimberley A. Taylor — Tucson
Attorney for Respondent/Appellant

E S P I N O S A, Judge.

¶1 Approximately one year after the dissolution of Samuel and Sara Alvarado's marriage and the division of their property and debt obligations, the trial court found Sara had failed to pay debts ordered by the decree and transferred to Samuel property originally awarded to Sara. On appeal, Sara argues this transfer created an inequitable distribution of property and violated her rights under federal and state statutes. Finding no error, we affirm.

Factual and Procedural Background

¶2 In March 2004, Sam and Sara's marriage was dissolved by decree and their community property and obligations divided. They owned three major assets; Sam's military retirement pension and two pieces of real estate—the Aurora and the Edison properties. Sara was awarded both properties and ordered to refinance them in her name within eighteen months of the decree. Sam was awarded his military pension and an unsecured promissory note from Sara for $22,015, which was intended to equalize the division of property. He was also ordered to quitclaim to her his interest in the Aurora property, having already transferred in 2001 his interest in the Edison property to her. That property was the site of an adult assisted-living business that Sara and Sam had purchased from Eduardo Chavez; Sara was ordered to pay the balance they jointly owed on a promissory note to Chavez and to indemnify Sam. She was also ordered to pay the debts associated with their Discover and Capital One credit cards and to, again, indemnify Sam. Sara was awarded the parties' Toyota Forerunner, and was presumably responsible for paying the vehicle loan they had both signed, though the decree did not specify this.

¶3 In January 2005, Sam petitioned for an order to show cause why the decree should not be set aside on the ground Sara had failed to abide by its terms. In April, the trial court sustained the decree but transferred the Edison property to Sam as compensation for Sara's "utter[] and complete[] fail[ure] to comply with the terms and conditions of the decree." The court found Sara had "not paid the mortgage on the Edison property, the business note [to Chavez], or any other debt she was allocated" by the decree. In May, Sara filed a motion for reconsideration, asserting that the court's order was "one-sided and unfair." In October, the court denied Sara's motion and this appeal followed.

Discussion

¶4 Sara contends the trial court's order awarding the Edison property to Sam created an inequitable distribution of property and violated her rights under federal and state statutes. In reviewing the apportionment of community property, we consider the evidence in a light most favorable to upholding the trial court's ruling and will sustain that ruling if the evidence reasonably supports it. *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 5, 972 P.2d 676, 679 (App. 1998). We will not disturb the ruling absent an abuse of discretion. *Id*.

Inequitable Distribution

¶5 The court transferred the Edison property to Sam pursuant to A.R.S. § 25-318(N), which provides that "[i]f a party fails to comply with an order to pay debts, the court may enter orders transferring property of that spouse to compensate the other party." Sara argues the court's order was not intended to compensate Sam for her failure to pay debts, but as a punitive measure. She claims the order created an inequitable distribution of

their property, pointing out she is now divested of her interest in both major assets awarded to her by the divorce decree[1] and is liable for the major debts, including judgments against her in favor of Sam and Chavez[2] as well as the other debt obligations ordered by the divorce decree.

¶6 The court's order was based on its finding Sara had failed to pay "the mortgage on the Edison residence, the business note [to Chavez], or any other debt she was allocated" by the divorce decree, which Sara conceded at the hearing. Deanna Ruiz testified at the hearing that the Edison and Aurora properties had gone into "a repossession state" due to Sara's failure to pay the mortgages from July to November 2004. In December 2004, Sam had paid approximately $14,000 to prevent foreclosure of the Edison residence but Sara, after making the January 2005 mortgage payment, then failed to make a payment from February to the date of the hearing in March. Ruiz testified that, since the date Sara had become responsible for the mortgage payments, the total mortgage debt had increased due to accumulated late fees. The court noted that Sara had not yet refinanced the properties as required by the decree and heard testimony that the foreclosures were listed on Sam's credit report.

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[1]In November 2004, Sam filed a civil complaint against Sara and was awarded $31,588.31, which constituted the amount still owing on the equalization payment ordered by the divorce decree and reimbursement for amounts he had paid to prevent the Edison property from being foreclosed by the mortgage lender. In February 2005, Sara quitclaimed the Aurora property to Sam in return for a $5,000 partial satisfaction of this judgment. Thus, Sara no longer possesses either the Aurora or Edison property.

[2]In February 2005, Chavez filed a complaint against both Sara and Sam, and in August was apparently awarded a $30,237 judgment against both parties.

¶7 Ruiz also testified the other debts for which Sara was responsible pursuant to the decree, including the Toyota Forerunner and the Discover and Capital One credit cards, had increased due to nonpayment and accumulated late fees. Ruiz stated she and Sam had discussed Sam purchasing a new home but that, because Sara's debts were also Sam's obligations, Sam's credit was "absolutely not" good enough. She further testified, "Sam won't be getting anything on credit for quite a long time," despite payments on his separate debts being "very current." Sam testified his credit had been "severely damaged" and he could not "get any credit of any kind right now." Sara's counsel conceded at the hearing that Sam's "credit history has been adversely impacted" by Sara's failure to pay her debts.

¶8 The court also heard testimony that called into serious question whether Sara had made an earnest and good faith attempt to pay debts as ordered by the decree. Sara testified her monthly income from the adult assisted-living business was $4,800 and her expenses were $150 plus the cost of utilities. When questioned why she had failed to make any payments despite this income, Sara responded, "I'm not arguing that I'm not going to pay it. I will pay, but not under the conditions of my being pressured," a statement the court found "telling." The court concluded Sara "could not satisfactorily explain . . . what she had done with the income she had received from the business since the entry of the Decree." Testimony at the hearing also established that Sara had intentionally hidden the Toyota Forerunner from creditors seeking to repossess the vehicle, and Sam testified that, based on a recent appraisal, $25,000 in damage had been done to the Aurora property while it was in

Sara's possession, rendering the property's current value less than the original purchase amount.[3]

¶9 The trial court did not abuse its discretion by transferring the Edison property to Sam, given the ample evidence before it that Sara had "fail[ed] to comply with an order to pay debts." A.R.S. § 25-318(N). Although Sara argues the transfer was inequitable, the court heard testimony that the Edison property carried approximately $38,000 in equity,[4] an amount the court could reasonably find compensated Sam for $25,000 in damage to the Aurora property and extensive harm to his credit rating. And because courts are only required to distribute property equitably rather than equally, *see Toth v. Toth*, 190 Ariz. 218, 221, 946 P.2d 900, 903 (1997), the trial court was permitted to consider that Sara had failed to pay the debts despite having sufficient income to do so, and that the Aurora property had fallen into serious disrepair while in her care but not yet refinanced by her as the decree required. *See Dawson v. McNaney*, 71 Ariz. 79, 86, 223 P.2d 907, 911 (1950) (court will consider whether party seeking equitable relief "has violated conscience[] or good faith,"

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[3]On appeal, Sara disputes that she caused $25,000 in damage to the Aurora property and suggests much of that amount can be explained by pre-existing damage and normal wear and tear. Sam testified, however, that, according to the appraisal, the $25,000 in damages was apart from normal wear and tear and the property was "worth less than [he paid for it] based upon the damage [he] ha[d] seen." The record also indicates the court viewed pictures of the damage to the property and could determine for itself from visual evidence the nature of the damage.

[4]Although Sara testified below and argues on appeal that the Edison property had over $100,000 in equity, when asked on what she based her valuation, she testified the property had been appraised in 2003 at $193,000 and that she still owed $155,000. She asserted, however, without evidence or support, that the property's value had increased by fifteen percent each year.

quoting Pomeroy, Equity Jurisprudence § 397 (3d ed.)); *see also* § 25-318(A) (court permitted to consider damage and destruction to community property in determining its distribution).

11 U.S.C. § 522(b) and A.R.S. § 33-1101

¶10 Sara next contends the court's ruling violated the protections she is afforded under 11 U.S.C. § 522(b) and A.R.S. § 33-1101. Title 11 U.S.C. § 522(b) permits "an individual debtor [to] exempt" certain property from the reach of creditors, while § 33-1101 permits residents to hold their "dwelling house" as "exempt from attachment, execution, and forced sale, not exceeding one hundred fifty thousand dollars in value." Sara asserts the bare proposition that "her equity [in the Edison property] was exempt under the Bankruptcy Code provisions and Arizona law" but neither explains any specific protections to which she is entitled nor cites supporting authority.

¶11 Sara failed to raise either of these claims below. As a general rule, a party cannot advance on appeal legal issues and arguments that have not been specifically presented to the trial court. *Sobol v. Marsh*, 212 Ariz. 301, ¶ 7, 130 P.3d 1000, 1002 (App. 2006). We find no applicable exception to that rule here. *See Aldrich and Steinberger v. Martin*, 172 Ariz. 445, 447-48, 837 P.2d 1180, 1182-83 (App. 1992) (exceptions to rule that appellate court will not address issue raised for first time on appeal include constitutional issues, question of statewide public importance, there is clearly a wrong to be redressed, or unraised issue will dispose of case on appeal and avoid futility of remanding to trial court to produce same result). Moreover, Sara waived these claims by failing to adequately explain

in her appellate briefs how either § 522(b) or § 33-1101 applies to the judgment here, particularly when she had neither commenced any bankruptcy proceedings nor affirmatively established the Edison property as her "dwelling" for such purposes. *See Keggi v. Northbrook Property and Cas. Ins. Co.*, 199 Ariz. 43, 51 n.2, 13 P.3d 785, 793 n.2 (App. 1991) (issues not clearly raised and argued in parties' appellate briefs are waived).

Disposition

¶12 The trial court's order transferring the Edison property to Sam is affirmed.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge